No. 82-1446

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LIFETIME COMMUNITIES, INC.,
Petitioner,

v.

THE ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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I.

The Administrative Office misstates the question presented by this case in a patent attempt to avoid the impact of the controlling decisions of this Court. Respondent asserts that the question is whether the Second Circuit "abused its discretion in refusing to consider *an argument* raised by petitioner for the first time . . ." while its Petition for Rehearing was pending. Brief for the Respondent in Opposition at I (emphasis added). The actual question presented is whether the Court of Appeals had the discretion to fail to determine whether a bill passed by the United States Congress, and undisputedly dispositive of this case, became the law of the United States subsequent to the District Court order appealed from.

Respondent would have the Court believe that the issue is whether petitioner waived its right to challenge error in the Judgment of the District Court by failing to make an argument at an earlier time.[1] While that is the nature of the issue presented by *every* case cited by respondent in support of its position,[2] *not one of these cases stands for the proposition that a Court of Appeals has discretion to refuse to apply a statute of the United States which became law subsequent to the District Court order from which it was appealed.* Furthermore, since anytime it is asserted that a statute governs the result in a case, the court must determine (1) that the statute exists, and (2) that the statute applies, respondent's authorities do not support the proposition that an appellate court has discretion to refuse to determine whether recently enacted legislation in fact became law.[3]

II.

Respondent does not dispute the fact that H.R. 4353, 97th Cong., 1st Sess. (1981), if law, governs the outcome of this case. Nor does respondent dispute the principle that an appellate court must apply the law currently in effect whenever a case is *sub judice*.

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[1] Lifetime, of course, does not and could not contend that the District Court erred in failing to apply H.R. 4353, because if the bill became law, as Lifetime asserts, it became law *after* the District Court entered its order.

[2] Brief for the Respondent in Opposition at 6-8. In each case cited, the argument that error had been committed below was either (1) not raised in the District Court, (2) raised below but not pressed on appeal, (3) raised on appeal but found to have been abandoned, (4) raised on appeal by another party but not adopted or answered by the party in question, or (5) raised in an improperly filed appeal.

[3] Respondent's appeal to principles of finality is likewise irrelevant. As respondent acknowledges, no final order determining the amount of Lifetime's payment to the Fund has yet been entered. Brief for the Respondent in Opposition at 2 n.1. Respondent cannot be said to have relied on any final action of the courts below.

Instead, respondent contends that the appellate court had discretion to refuse to determine whether recently enacted legislation became a statute of the United States, and if so, to refuse to apply this statute, because Lifetime did not raise the question of the effectiveness of the veto of H.R. 4353 at an earlier time. Yet respondent never suggested any untimeliness in the Court of Appeals, and indeed, agreed that the issue should be heard. Moreover, prior to Lifetime's raising the issue, counsel for respondent were obviously unaware of the potential invalidity of the purported veto of H.R. 4353 (an issue which the government asserts "presents difficult questions of constitutional law," Brief for the Respondent in Opposition at 9), since, had they been aware of it, counsel undoubtedly would have complied with their "continuing duty to inform the Court of any development which may conceivably affect an outcome." *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring). *See Douglas v. Donovan*, No. 82-1248 (D.C. Cir. April 12, 1983): "As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation. . . . This is especially true for government attorneys, who have special responsibilities to both this court and the public at large." [4]

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[4] The most recent judicial challenge to the constitutional validity of a pocket veto used during an intersessional recess of Congress (the same circumstances under which H.R. 4353 was purportedly vetoed) was concluded when the government consented to entry of judgment for the plaintiff. *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976). At the time, the Attorney General of the United States issued the following statement:

> President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has

In any event, there is no basis for a discretionary exception to the rule that a reviewing court must apply a recently enacted statute. To the contrary, this Court has recognized that the obligation of a reviewing court to decide a case under a new statute applies regardless of whether counsel for the parties bring the new law to the court's attention *at all*.[5]

Fusari v. Steinberg, *supra*, involved a constitutional challenge to a Connecticut statute. Subsequent to this Court's notation of probable jurisdiction, but prior to briefing on the merits and oral argument, the Connecticut legislature enacted major revisions of the law in question. 419 U.S. at 385, 387 n.12. Counsel for neither party informed the Court of the substantial changes brought about by the new law.[6] 419 U.S. at 387 n.12. Nonetheless, this Court held that it "must review the District Court's judgment in light of presently existing Connecticut law, not the law in effect at the time that judgment was rendered." 419 U.S. at 387. The case was remanded for reconsideration in light of the new law. 419 U.S. at 387-

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specifically authorized an officer or other agent to receive return vetoes during such periods.

Reprinted in 123 Cong. Rec. S39334 (December 15, 1977). Thus, had the Justice Department realized that H.R. 4353 had been subject to a purported pocket veto during an intersessional recess of Congress during which an agent of the House was authorized to receive the bill, the Department's attorneys would have recognized that the attempted veto was a "significant event that may bear directly on the outcome of litigation."

[5] In the instant case, of course, petitioner brought the statute to the attention of the Court of Appeals as soon as counsel for petitioner became aware that the veto was potentially defective, and while the case was still before that court on a petition for rehearing. Any suggestion to the contrary is unfounded, illogical, and offensive.

[6] "The only reference to changes in the law [in one party's brief] actually gives the impression that their effect is negligible." *Fusari v. Steinberg*, *supra*, 419 U.S. at 391 (Burger, C.J., concurring).

90. Nowhere did the Court even hint that it had discretion to refuse to decide the case under the new statute because of counsel's failure to inform the Court of the significant statutory changes.[7]

Nor did the government suggest to the Second Circuit that it had any discretion to refuse to consider the applicability of H.R. 4353. When Lifetime raised the issue in the Court of Appeals, respondent stated:

> In the interests of justice, the government believes that this case should be reheard by the panel on this issue alone, and accordingly a briefing schedule should be established so that Appellant's claim may be fully aired.

This is precisely what was required by the decisions of this Court.

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[7] Furthermore, respondent has no basis for suggesting that the Court of Appeals denied petitioner's H.R. 4353 Motion on the grounds of the asserted discretion. The Court of Appeals gave no reasons for its decision, and respondent never raised any claim of lack of timeliness below. Indeed, respondent did not challenge the applicability of *Fusari* when Lifetime cited it in its motion for leave to file a memorandum supplementing its petition for rehearing. Respondent's attempt to characterize the decision below as it does is unfounded speculation.

CONCLUSION

The petition for writ of certiorari should be granted. Petitioner respectfully suggests that the Judgment below be summarily vacated with instructions to the Court of Appeals either (i) to determine whether the veto of H.R. 4353 was effective, or (ii) to remand the case to the District Court to make such a determination. *Fusari v. Steinberg*, *supra*; *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974); *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944); *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23 (1940).

Respectfully submitted,

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